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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BELLA G., A person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANTHONY G.,

Defendant and Appellant.

B289026

(Los Angeles County
Super. Ct. No. DK23777)

APPEAL from orders of the Superior Court of Los Angeles County, Nancy Ramirez, Judge. Reversed in part and affirmed in part.

Matthew Joseph Hardy III, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel and Sarah Vesecky,
Senior Deputy County Counsel, for Plaintiff and Respondent.

Appellant Anthony G. (Father) appeals the jurisdictional and dispositional orders of the juvenile court as they pertain to him. The court asserted jurisdiction over his daughter, Bella G., under Welfare and Institutions Code section 300, subdivision (b), due to drug use by the child's mother, but also found jurisdiction based on Father's criminal history and current incarceration.¹ In its dispositional order, the court, among other things, imposed a drug testing requirement on Father and limited his contact with Bella to monitored visitation. We conclude the court improperly found that assertion of jurisdiction was warranted, as the facts alleged and found true by the court established nothing more than that Father had a 13-year old drug conviction and was currently incarcerated. Accordingly, we reverse the portion of the jurisdictional and dispositional order pertinent to Father.

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2017, the Department of Children and Family Services (DCFS) received a referral alleging that

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Bella's mother, Cindy M. (Mother), was neglecting Bella and using drugs. On July 25, the caseworker went to Mother's home and found paternal aunt Cindy G. and paternal grandmother Isabel G. who had gone to the home to make sure Bella was safe, after seeing pictures of Mother smoking methamphetamine sent by Mother's boyfriend, Allen V. Because Mother was high when Cindy and Isabel arrived, they called the Sheriff's Department.² The caseworker observed that Bella seemed to be in good health, clean and dressed appropriately. He did not report finding drugs or drug paraphernalia. However, there was little food in the house and it smelled strongly of marijuana.

Mother admitted using methamphetamine and tested positive for methamphetamine, amphetamines and cannabinoids. She admitted she had been high when she picked Bella up from the maternal grandmother on July 24.³

² The caseworker learned that on July 20, the maternal grandmother and a maternal uncle, Andrew M., had taken Bella away from Mother because they were concerned about her drug use. Andrew had been staying with Mother for a few days and had observed her using methamphetamine. Maternal and paternal relatives had taken turns caring for the girl until July 24, when Mother insisted they return Bella to her. The record reflects that the call to DCFS on July 19 came from Andrew. The caseworker went to Mother's home on July 20, but was unable to gain entry.

³ Mother did not contest jurisdiction. The court found true that Mother "has a history of illicit substance use and is a recent user of amphetamine, methamphetamine and marijuana which limits [her] ability to provide regular care and supervision of the
(*Fn. continued on next page.*)

Mother claimed that Father had introduced her to methamphetamine and that she had left him due to domestic violence, but also claimed that her usage of the drug had increased because Father “wasn’t there . . . supporting [her]” and because he had lied to her about getting back together in 2016. Bella, then six, denied that Mother used drugs in front of her, but said that she was locked in the bedroom when Mother “wanted her privacy.” Cindy said she believed Mother had been using drugs “off and on” for years. The maternal grandmother said Mother had been “acting strange” for “a[]while” -- “short tempered,” “verbally aggressive,” and “not herself.”

Bella was detained and placed with Cindy. Cindy expressed willingness to care for the girl permanently.

Father was in jail at the time of the detention and had been there since the previous month.⁴ He was out on

child,” and that she “created a detrimental condition in the home by leaving drug paraphernalia within access of the child.” The court also specifically found that on July 24, 2017 and “prior occasions,” Mother “possessed and was under the influence of illicit substances while the child was in [her] care,” that on July 26, 2017, Mother “had a positive toxicology screen for amphetamine, methamphetamine and marijuana,” and that these findings “place[d] the child at risk of harm.” Mother is not a party to this appeal, and the court’s findings with respect to her are not at issue.

⁴ Records indicated that Father had been arrested in May and June 2017 for carrying a loaded firearm and being a felon in possession of a firearm.

probation when interviewed by the caseworker in September 2017. He said he was aware Mother smoked marijuana and admitted that they smoked it together when they were a couple. Mother told Father before Bella was born that she had used more serious drugs “one time.” When Father visited Bella in Mother’s home, the home was clean and Bella seemed well cared for. Father noticed Mother had lost weight, but had not observed her using drugs or seen any drug paraphernalia in her home. Father denied any recent use of drugs and said he had been testing clean since 2005.

Father had a lengthy criminal history, including a 2004 conviction for violating Health and Safety Code section 11352, subdivision (a) (transport for sale or sale of a controlled substance); a 2005 conviction for inflicting corporal injury on a spouse or cohabitant; a 2005 conviction for possessing a firearm, and 2015 convictions for evading a peace officer and felony hit and run. Although released for a period following the detention hearing, by the time of the February 2018 jurisdictional hearing, Father had been rearrested, and was facing charges of unlawful possession of a firearm, possession of a silencer, possession of an assault weapon and driving a vehicle without the consent of its owner.

The jurisdictional petition filed by DCFS alleged that Father had “a drug related criminal history of convictions of Transport/Selling Narcotics/Controlled Substance,” was “currently incarcerated,” and that his “criminal history and conduct endanger[ed] [Bella’s] physical safety and emotional

well[-]being and create[d] a detrimental home environment, placing the child at risk of serious physical and emotional harm and damage.”

At the February 23, 2018 jurisdictional hearing, counsel for DCFS argued that Father’s criminal history created a risk to Bella, noting that Father had had a drug conviction in the past; that he had more recently been convicted of being a felon in possession of a firearm, evading a peace officer and felony hit and run; and that he was currently facing charges of possession of a firearm, a silencer and an assault weapon. Bella’s attorney joined DCFS in urging the court to sustain the allegation pertaining to Father. Father’s attorney contended that the allegation should be dismissed, as there was “no showing of nexus between risk of harm or illness to [Bella]” and the conviction alleged in the petition. Counsel observed that the only drug-related conviction was from 2004, more than a decade earlier and before Bella was born. With respect to the other convictions mentioned by DCFS’s counsel in argument, Father’s counsel pointed out that they were not alleged in the petition and that there had been no showing that they were related to a risk of harm to Bella or that she had been present when the criminal conduct occurred.

The court found the allegation of the petition pertaining to Father true without amendment, and further found that the allegation supported assertion of jurisdiction under section 300, subdivision (b). When the court announced its findings, Father’s counsel asked it to clarify

how Father's criminal history and current incarceration endangered Bella. The court replied: "Based on the fact that it is true that he has been convicted of the crimes and that the child could be at risk of harm, given that he has been found to be in possession of a firearm, silencer, assault weapons, et cetera."

Turning to disposition, the court ordered Father to submit to five drug tests and to participate in a drug rehabilitation program if any tests were dirty. The court also ordered Father to participate in parenting classes and individual counseling to address case issues. Any visitation between him and Bella was to be monitored. Father's counsel said she had "no objections" to the dispositional plan, but added that she did not believe the facility at which Father was incarcerated offered any programs or services. The court instructed the caseworker to inquire. Father noticed an appeal of the jurisdictional and dispositional orders.

DISCUSSION

Father contends substantial evidence does not support the court's finding that his history of criminal convictions and current incarceration posed a risk of harm to Bella. For the reasons discussed in part B below, we agree.

A. Forfeiture and Appealability

Preliminarily, we address respondent's contentions concerning forfeiture and appealability.

Father acknowledges that this appeal will not deprive the court of jurisdiction over Bella, as he does not challenge the findings concerning Mother's drug abuse. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [single true finding can support court's assertion of jurisdiction, and reviewing court "need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence"]; *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1316 [juvenile court permitted to adjudicate nonoffending parent's parental rights because personal jurisdiction over nonoffending parent "is derivative of the court's jurisdiction over the minor and is unrelated to [his or her] role in creating the conditions justifying the court's assertion of dependency jurisdiction"].) He asks that we nonetheless consider the merits of his appeal because the contested findings served as the basis for the dispositional order that is also challenged on appeal, and may prove prejudicial in other ways in current or future dependency or family law proceedings. (See *In re M.W.* (2016) 238

Cal.App.4th 1444, 1452 [appellate courts generally consider merits of parent's appeal of jurisdictional finding when it "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) "could have other consequences for [the appellant], beyond jurisdiction" [citation]"]; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 ["The fact that the dependency action has been dismissed should not preclude review of a significant basis for the assertion of jurisdiction where exercise of that jurisdiction has resulted in orders which continue to adversely affect appellant," such as "restrictive visitation and custody orders"].) Respondent contends Father forfeited the right to appeal the dispositional order because his attorney did not challenge it when it was announced by the juvenile court, and that this alleged inability to challenge the dispositional order precludes consideration of the jurisdictional order.

We do not view Father's counsel's statement that she had "no objection" to the proposed disposition as having any impact on his right to challenge either the jurisdictional or the dispositional order on appeal. Father had no basis to object to the dispositional order other than his contentions -- already rejected by the court -- that Father was non-offending, that the only proof of drug use was the drug-related conviction that occurred before Bella was born, and that the jurisdictional allegation pertaining to him should be

dismissed. A party is not required to raise an objection if the court has made clear that objection would be futile. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649.)

Respondent contends that a juvenile court may order a nonoffending parent to participate in reunification services, and that the evidence regarding Father's criminal history supported the court's dispositional order without regard to its findings on the contested jurisdictional allegation. We need not address whether a juvenile court may impose reunification requirements on a nonoffending parent because the dispositional order in the present case was not otherwise supported by the evidence. Father was ordered to drug test although he had not been convicted of a drug-related offense since 2004, and there was no evidence of recent drug use. (Cf. *In re Briana V.* (2015) 236 Cal.App.4th 297, 310-311 [although court made no finding that father had sexually abused his children, appellate court upheld order requiring him to participate in sex abuse counseling because he was a registered sex offender]; *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1007 [juvenile court properly ordered father to submit to drug and alcohol testing where evidence showed he had a DUI in the past and child, who was medically fragile, required "a stable, sober caregiver"].)

Respondent alternatively contends that Father is attacking the sufficiency of the petition and cannot raise such challenge to the petition for the first time on appeal. The majority of courts hold that failure to demur to a

defective petition waives the defect. (See, e.g., *In re John M.* (2012) 212 Cal.App.4th 1117, 1123; *In re S.O.* (2002) 103 Cal.App.4th 453, 459-460; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328; but see *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) This does not, however, preclude a party from alleging that the evidence was insufficient to support jurisdiction. (See *In re Athena P.* (2002) 103 Cal.App.4th 617, 629 [“[I]f the Department was not able to introduce sufficient evidence of jurisdiction, then trial counsel’s failure to challenge the sufficiency of the petition was not prejudicial, because [the parent] can still obtain reversal on that ground.”].) In any event, Father’s counsel argued at the jurisdictional hearing that conduct not alleged in the petition was not properly before the court, and that there was no nexus between the conduct alleged (committing a drug-related offense years ago and being incarcerated at the time of the jurisdictional hearing) and any current risk of harm to Bella. Counsel thus challenged both the sufficiency of the language of the petition and the sufficiency of the evidence. There was no waiver or forfeiture.

B. *Sufficiency of the Evidence*

DCFS alleged and the court found true that the allegation pertaining to Father supported jurisdiction under section 300, subdivision (b). A child may be adjudged a dependent of the court under subdivision (b) of section 300 if the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result

of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse.” (§ 300, subd. (b)(1).)⁵ A true

⁵ We note that DCFS did not attempt to establish jurisdiction under section 300, subdivision (g), a provision specifically applicable to incarcerated parents. Subdivision (g) provides that a child may be adjudged a dependent of the court if “the child’s parent has been incarcerated or institutionalized and cannot arrange for the care of the child.” To support jurisdiction under this provision, DCFS must present evidence that the parent could not arrange care while incarcerated. (*In re Andrew S.* (2016) 2 Cal.App.5th 536, 543.) The language of the provision “demonstrates that the Legislature did not intend dependencies to be established . . . where the incarcerated parent is able to make suitable arrangements for his or her children’s care.” (*In re Aaron S.* (1991) 228 Cal.App.3d 202, 212.) There was no attempt to establish that Father was unable to arrange care. The fact that his mother and sister were at Mother’s home, prepared to take custody of Bella before the caseworker arrived, and that the paternal aunt agreed to care for Bella long-term suggests that Father would have been able to meet that hurdle.

Although subdivision (b) of section 300 permits assertion of jurisdiction where the parent has willfully or negligently “fail[ed]”
(*Fn. continued on next page.*)

finding under this subdivision requires evidence of ““serious physical harm or illness”” to the child, or ““a ‘substantial risk’ of such harm or illness.” [Citations.]” (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) Proof of this element ““effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future”” (*Ibid.*, quoting *In re B.T.* (2011) 193 Cal.App.4th 685, 692, italics omitted.) Evidence of past conduct may be probative of current conditions. (*In re D.L.*, *supra*, at p. 1146.)

DCFS bears the burden of proving that the minor comes under the juvenile court’s jurisdiction by a preponderance of the evidence. (*In re M.R.* (2017) 7 Cal.App.5th 886, 896; see § 355, subd. (a).) On appeal, “we must uphold the court’s [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

. . . to provide the child with adequate food, clothing, shelter, or medical treatment,” courts have uniformly held that jurisdiction cannot be based on an absent parent’s failure to provide support, where the child is being adequately cared for by the custodial parent or another guardian. (§ 300, subd. (b)(1); see, e.g., *In re Andrew S.*, *supra*, 2 Cal.App.5th at p. 542; *In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1065; *In re X.S.* (2010) 190 Cal.App.4th 1154, 1160-1161.)

As many courts have said, dependency jurisdiction cannot be established based solely on a parent's criminal conduct and incarceration; "[t]here is no 'Go to jail, lose your child' rule in California." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077; accord, *In re M.R.*, *supra*, 7 Cal.App.5th at pp. 896-897; *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672; see also *In re Noe F.* (2013) 213 Cal.App.4th 358, 369 ["[A] finding of detriment cannot be based solely on the fact a parent is incarcerated."].) Here, the sole allegation pertaining to Father stated that he had a drug-related criminal history and was currently incarcerated. The evidence presented established that he had a drug conviction in 2004, was incarcerated at the time of the jurisdictional hearing, had a number of other convictions not referenced in the petition, and was facing charges of unlawful possession of a firearm, possession of a silencer and possession of an assault weapon, also not referenced in the petition. However, there was no evidence that his criminal activities endangered Bella, for example, that he recently abused drugs, engaged in criminal activity when she was present, or left drugs or weapons in any place to which she had access. In arguing in support of the allegation, DCFS's counsel discussed nothing other than Father's incarceration and criminal history. He did not point to any recent actions by Father that would warrant assertion of jurisdiction other than his criminal conduct. In

making its finding, the court stated that the risk of harm to Bella arose solely from Father's "criminal convictions."⁶ Accordingly, we must conclude that the jurisdictional finding was improperly based solely on Father's status as a criminal.

Respondent contends that jurisdiction was appropriate under subdivision (b) of section 300 because Father failed to participate more actively in his child's life and took no steps to remove her from Mother's "extremely unsafe and dysfunctional home," citing *In re James C.* (2002) 104 Cal.App.4th 470. In *James C.*, the children had been severely neglected for years. They were found to be suffering from scabies and head lice. In addition, the family home was filthy and unsafe, and the mother had permitted a convicted sex offender to move in. The appellate court affirmed the juvenile court's finding that the incarcerated father had been neglectful because there was no evidence he had made any inquiries about the children during his lengthy imprisonment, or that he had attempted to make alternative arrangements for the children once their circumstances were made known to him. (*Id.* at p. 483.) The court stated: "The absence of evidence suggesting that the father was ever interested in the welfare of the two toddler children during the entire time of his incarceration was sufficient for the

⁶ We note that the court's statement that Father's convictions included "possession of a . . . silencer [and] assault weapon" was incorrect. Although those charges were pending at the time of the hearing, he had not been convicted.

juvenile court to infer that he either could not or was incapable of making preparations for their care.” (*Id.* at p. 484.)

We have no quarrel with the proposition that an incarcerated parent may be charged under subdivision (b) of section 300 with failing to protect his or her child from a longstanding abusive situation of which the parent was or should have been aware. However, such an allegation must be pled and proved, and the parent must have notice and the opportunity to defend against it. (See *In re Andrew S.*, *supra*, 2 Cal.App.5th at p. 544 [“To the extent the juvenile court interpreted the petition to charge that [incarcerated father] had failed to protect the children from [mother’s] physical abuse, the Department never made any such allegation; and [father] had no notice or opportunity to defend against it. . . . [D]ue process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object.”].) Here, the petition did not allege that Father was aware of Mother’s substance abuse and failed to protect his child from it, and DCFS’s counsel did not argue that the petition should be interpreted that way.

Respondent contends, nevertheless, that the jurisdictional finding should be affirmed because the evidence supported an inference Father was or should have been aware of Mother’s drug problem. The court made no findings indicating jurisdiction was supported by Father’s

knowledge of and failure to protect Bella from the consequences of Mother's drug abuse. Where the trial court fails to make express findings, we may imply such findings only where the evidence is clear. (*In re Marquis D.* (1985) 38 Cal.App.4th 1813, 1825.) The evidence concerning Father's knowledge was equivocal. Mother claimed she started using methamphetamine when she and Father were together. But Father denied knowing Mother was abusing the drug, and said that when he visited Bella in Mother's home, the child appeared to be well cared for and he noticed no drug paraphernalia. The caseworker confirmed that Bella appeared well cared for and did not report seeing drugs or drug paraphernalia in the home. Under these circumstances, we cannot imply the finding needed to support the assertion of jurisdiction under subdivision (b) of section 300 on the ground Father failed to protect Bella from Mother's drug use. As the facts the court found true -- that Father had a drug related conviction in 2004 and was currently incarcerated -- were insufficient to support assertion of jurisdiction, the jurisdictional finding pertaining to Father must be reversed. The dispositional order on which the findings are based must also be reversed. Should conditions have changed while this appeal was pending or additional facts been revealed, DCFS may, of course, file any supplemental petition warranted by current conditions.

DISPOSITION

The jurisdictional finding with respect to Father is reversed. The dispositional order pertaining to Father is reversed. In all other respects the jurisdictional and dispositional orders are affirmed.

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REPORTS**

MANELLA, P. J.

We concur:

COLLINS, J.

DUNNING, J.*

*Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution